Office-Supreme Court, U.S.
FILED
MAY 17 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1542 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED GAS TRANSMISSION CORPORATION,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission correctly interpreted a settlement agreement entered into by petitioner and petitioner's customers and approved by the Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 745 F.2d 281. The orders of the Federal Energy Regulatory Commission (Pet. App. 22a-43a) are reported at 22 F.E.R.C. ¶ 61,120 and 23 F.E.R.C. ¶ 61,018.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1984. A petition for rehearing was denied on October 31, 1984. On January 10, 1985, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including March 30, 1985, and the petition was filed on March 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates an interstate natural gas pipeline serving portions of the northeastern United States. Petitioner's rates for the resale of natural gas are subject to regulation by the Federal Energy Regulatory Commission (FERC) under Section 4(a) of the Natural Gas Act of 1938, which requires that such rates be "just and reasonable." 15 U.S.C. 717c(a). This case concerns the Commission's interpretation of a settlement agreement entered into by petitioner and its customers, and approved by the Commission pursuant to its authority under the Natural Gas Act. See generally *Mobil Oil Corp.* v. *FPC,* 417 U.S. 283 (1974).

One element of the rates charged by a pipeline for natural gas is the price that the pipeline receives for any "old" gas that is produced by the pipeline itself.[1] The Commission in the past valued this gas on the basis of the cost to the pipeline of producing the gas (the "cost of service" methodology). But the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.,* has altered the regulatory structure applicable to sales of natural gas.[2] The statute establishes prices for a "first sale" of natural gas. 15 U.S.C. 3311-3319. The Commission first concluded that gas produced by pipelines did not qualify for "first sale" treatment, and required interstate pipelines to continue pricing their "old" gas under the cost of service methodology. See *Order No. 58,* 44 Fed. Reg. 66577 (1979); *Order No. 98,* 45 Fed. Reg. 53091 (1980);

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[1]"Old" gas is gas produced from wells drilled before January 1, 1973, on leases acquired before October 8, 1969. See *Pipeline Production Area Rate Proceeding (Phase I),* 42 F.P.C. 738, 745 (1969), aff'd *sub nom. City of Chicago* v. *FPC,* 458 F.2d 731 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972).

[2]This Court reviewed the history of pre-NGPA regulation in *Public Service Commission* v. *Mid-Louisiana Gas Co.,* 463 U.S. 319, 327-331 (1983).

Order No. 102, 45 Fed. Reg. 67083 (1980). However, several pipeline companies, including petitioner, sought review of the Commission's orders and, ultimately, this Court agreed with the Fifth Circuit in rejecting the Commission's conclusion. *Public Service Commission* v. *Mid-Louisiana Gas Co.,* 463 U.S. 319, 338 (1983).

2. During the time that this issue was in litigation, petitioner filed for several rate increases. The increased rates reflected, among other things, petitioner's contention that its "old" gas should receive NGPA "first sale" treatment. Petitioner and its customers entered into settlement agreements in some of these rate cases.[3] The first settlement agreement (1979 Agreement) covered petitioner's rates for the period from December 1, 1978 (the effective date of the NGPA), through June 30, 1980. The agreement contained an express reservation of the question at issue in the *Mid-Louisiana Gas Co.* litigation — the treatment to be accorded pipeline production of "old" gas (C.A. Supp. App. 19):

> The treatment of pipeline production * * * shall be an issue reserved for hearing and Commission decision which decision shall be made on the basis of the hearing record or any subsequent settlement agreement.
>
> * * * * *
>
> This agreement to reserve the pipeline production issue * * * shall not affect any party's right to seek rehearing, stay, and court review as to the applicability of the NGPA to such production and the validity of the Commission's rules, regulations, and orders thereunder.

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[3]As the court below observed (Pet. App. 9a), "[t]he practice has not been uncommon for a pipeline company and the FERC to negotiate a settlement once a rate increase request has been set for hearing."

The settlement was approved by the FERC, which described the agreement as "reserv[ing] the pipeline production issue." *Consolidated Gas Supply Corp.*, 9 F.E.R.C. ¶ 61,185, at 61347 (1979).[4]

A second settlement agreement (1980 Agreement) set petitioner's rates for the period July 1, 1980 to December 31, 1981 (see Pet. App. 67a-81a). Although the agreement contained express reservations regarding several issues (see, *e.g.*, *id.* at 70a, 73a), it did not include a reservation of the production pricing issue similar to the provision in the 1979 Agreement. The 1980 Agreement contained boilerplate language stating (*id.* at 81a) that neither petitioner, the Commission nor other parties "shall be deemed to have waived any claim or right which it may otherwise have with respect to any matters not expressly provided for herein." This agreement also was approved by the Commission. *Consolidated Gas Supply Corp.*, 15 F.E.R.C. ¶ 61,006 (1981). The discussion of reserved issues in the Commission's order did not refer to the pipeline production issue.

3. After the Fifth Circuit held that pipeline production was eligible for "first sale" treatment under the NGPA, petitioner sought to recover those prices for the period from December 1, 1978 to December 31, 1981.[5] The Commission acknowledged that petitioner could price its current production under the the NGPA, but held that the settlement agreements governed petitioner's ability to reprice its gas retroactively for the periods covered by the agreements (Pet. App. 24a-26a).

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[4]Several more recent settlement agreements entered into by petitioner also included specific reservations of this issue. See FERC C.A. Br. App. A at 2; FERC C.A. Br. App. B at 5.

[5]The Fifth Circuit's mandate issued prior to this Court's decision in *Public Service Commission* v. *Mid-Louisiana Gas Co.*, *supra*.

With respect to the 1979 Agreement, the Commission held that petitioner had reserved the right to make retroactive price adjustments in the event the Commission's pipeline production pricing rule was overturned (Pet. App. 29a). The Commission reached a different result regarding the effect of the 1980 Agreement. It found (*id.* at 30a) that "[t]he body of the agreement does not address the pipeline production pricing issue. * * * The agreement does not preserve any right to assert NGPA treatment for pipeline production." The Commission held that the general reservation provision did not reserve petitioner's right to implement the higher prices for the period covered by the 1980 Agreement (*ibid.*).

4. The court of appeals unanimously affirmed (Pet. App. 1a-21a). The court held that the 1980 Agreement did not reserve to petitioner the right to retroactively price its gas at the higher NGPA levels. It stated (*id.* at 17a-18a) that the specific reservation of this issue in the 1979 Agreement and the absence of such a reservation in the 1980 Agreement supported this conclusion:

> [H]aving compared the two agreements, it is impossible to conclude that they mean the same thing and have the same effect insofar as a) allowing retroactive gas pricing at the NGPA level and b) permitting surcharges to effect collection. [Petitioner] clearly exhibited its awareness of how to put a matter finally to rest and, equally, of how to reserve issues.

Finding that "[i]t is a reasonable interpretation device to conclude that what someone has not said, someone has not meant" (*id.* at 19a), the court concluded that petitioner failed to reserve the pricing issue in the 1980 Agreement.

ARGUMENT

Petitioner mischaracterizes the FERC's order in this case as an attempt to undermine this Court's decision in *Public*

Service Commission v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983). The Commission permitted petitioner to recover retroactively the higher rates authorized by *Mid-Louisiana Gas Co.* where petitioner reserved the issue in its settlement agreement. Thus, the only question presented here is whether the Commission and the court of appeals properly concluded that petitioner failed to reserve its right to such retroactive price increases in the 1980 Agreement.[6] The unanimous decision of the court of appeals with respect to this question is correct and does not conflict with any decision of this Court or any decision of another court of appeals. Further review of this fact-bound issue is not warranted.

1. The Commission's interpretation of the 1980 Agreement clearly is correct.[7] The 1980 Agreement does not include a provision specifically reserving petitioner's rights with respect to the pricing of pipeline production, in contrast to the specific reservation that was included in the 1979 Agreement and that also appears in more recent settlement agreements entered into by petitioner (see pages 3-4 & note 4, *supra*). The court of appeals properly found (Pet. App. 20a) that "the reservation in [the 1979 Agreement] and the lack of reservation in the [1980 Agreement] spring forth and

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[6]Petitioner does not argue that the NGPA should be read to override the settlement agreement. Such an argument would, of course, be wholly without merit. Congress made clear that the prices authorized by the NGPA "are ceiling prices only. In no case may a seller receive a higher price than his contract permits." S. Conf. Rep. 95-1126, 95th Cong., 2d Sess. 74 (1978). Since the settlement agreement certainly is no less binding than a contract, petitioner could not recover the higher NGPA rates if those rates are precluded by the settlement agreement.

[7]As the court below observed (Pet. App. 19a-20a & n.23), the Commission's interpretation of the settlement agreement is entitled to deference. Cf. *New Orleans Public Service, Inc.* v. *FERC*, 659 F.2d 509 (5th Cir. 1981); *Coca-Cola Co.* v. *Atchison, Topeka, & Santa Fe Ry.*, 608 F.2d 213, 222 (5th Cir. 1979).

compel the conclusion that the hope of NGPA pricing for the July 1, 1980 through December 31, 1981 period had been discarded by [petitioner], presumably in return for another benefit or benefits."

This difference between the two agreements is especially probative because the 1980 Agreement does contain specific reservations relating to several other issues. For example, Article III of the agreement provides that the rate of return on equity to be applied in setting rates would be the rate fixed in a pending review proceeding (see Pet. App. 70a-71a). Similarly, Article IV provides that with respect to a dispute concerning certain other charges "[i]t is stipulated and agreed that this issue be reserved and tied to the outcome of a similar issue in Texas Gas Transmission Corporation (Texas Gas), Docket No. RP78-94. A Commission resolution of the merits of that issue in the Texas Gas proceeding shall be applied to this reserved issue." Pet. App. 71a; see also *id.* at 74a (reserving storage accounting issue "for disposition by settlement or hearing in this Docket"). The absence of a specific reservation of the production pricing issue in the face of this litany of express reservations provides further evidence that the 1980 Agreement does not permit the price increases sought by petitioner. See *id.* at 17a-18a.

Moreover, the 1980 Agreement states that it was intended "to provide for the resolution of all of the cost of service issues" pending before the Commission in the particular docket (Pet. App. 67a). The Commission found that the settlement "expressly provide[d] for pricing of pipeline production on a cost-of-service basis," and that the failure to reserve the issue therefore was determinative (*id.* at 30a-31a). The court of appeals agreed (*id.* at 14a) that "[s]ince the proper pricing of 'old' gas was a crucial issue in [the proceeding culminating in the 1980 Agreement], any reservation of rights should have been specifically enunciated in

the settlement." It concluded that "[i]t is a reasonable interpretation device to conclude that what someone has not said, someone has not meant" (*id.* at 19a).[4] In view of petitioner's practice of explicitly reserving the issue in other settlement agreements, the presence of specific reservations with respect to other issues in the 1980 Agreement, and the fact that the pricing of pipeline production was a major issue in the 1980 proceeding, the Commission and the court below properly found that petitioner failed to reserve the right to retroactively assess its customers on the basis of an increased price for pipeline production.

2. Petitioner raises a number of arguments challenging this result, none of which has merit.

a. Petitioner first claims (Pet. 10-11) that the Commission applied an "unprecedented" (*id.* at 10) test in interpreting the settlement agreement. This assertion is incorrect. The Commission followed settled rules of contract interpretation as did the court of appeals, which reached the same conclusion as the Commission "purely as a matter of contract interpretation common to many areas of legal endeavor" (Pet. App. 20a (footnote omitted)).

b. Petitioner also asserts (Pet. 14-17) that "the Fourth Circuit ignored the Commission's specific finding that the 1980 rate case settlement was silent on the issue of NGPA pricing for old pipeline production" (*id.* at 14), but there was no disagreement between the Commission and the court of appeals. The court of appeals agreed that the settlement was silent with respect to the availability of

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[4]The 1980 Agreement did contain a boilerplate general reservation provision (see Pet. App. 80a-81a), but the Commission (*id.* at 30a-31a) and the court of appeals (*id.* at 18a-19a) properly concluded that this general provision could not be read to override the parties' specific intent to resolve the "cost of service issues," which included the question of the pricing of pipeline production.

NGPA pricing (see Pet. App. 14a, 18a). Both the Commission (*id.* at 26a-27a) and the court of appeals (*id.* at 19a) relied upon *Texas Eastern Transmission Corp.* v. *FPC*, 306 F.2d 345 (5th Cir. 1962), cert. denied, 375 U.S. 941 (1963), in concluding that the agreement could not be interpreted to permit retroactive price increases because of the absence of a specific reservation of the pipeline production issue.

c. Finally, petitioner argues (Pet. 12-13 & n.31) that its right to increase rates through purchased gas adjustment (PGA) proceedings somehow is relevant to its ability to retroactively increase its prices. A PGA clause in a pipeline company's rate tariff enables the company to adjust its rates to reflect changes in gas costs without initiating a general rate proceeding under Section 4 of the Natural Gas Act of 1938. See 18 C.F.R. 154.38(d)(4). Petitioner argues that it was free to use the PGA procedure to increase its rates to reflect the NGPA prices for pipeline production. However, a pipeline cannot use the PGA procedure to evade restrictions imposed as a result of a Section 4 rate proceeding or agreements between the pipeline and its customers. See *Florida Gas Transmission Corp.* v. *FERC*, 741 F.2d 1307, 1311 (11th Cir. 1984); *Associated Gas Distributors* v. *FERC*, 706 F.2d 344, 347-348 (D.C. Cir. 1983). Thus, petitioner could not recoup higher prices for its pipeline production through PGA filings if such prices were not permitted by the 1980 Agreement. For the reasons discussed above, it is plain that the agreement bars petitioner from recovering these higher prices.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1985

DOJ-1985-05